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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

UTAH FOAM PRODUCTS, INC., a Utah Corporation, Plaintiff, Appellant, and Cross-Appellee, v. URETHANE COMPANY OF UTAH, a Utah Corporation; EDWARD E. KENDALL; and NEIL B. KENDALL, Defendants, Appellees, and Cross-Appellant, And BRUCE B. WILSON, and UNITED COATINGS, INC., a Washington corporation, Counterclaim Defendants.	:	**Appeal No. 970140-CA** **Priority No. 15**

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REPLY BRIEF OF APPELLANTS

On Appeal From a Final Judgment of the Third Judicial District Court for Salt Lake County, State of Utah
Honorable Leslie A. Lewis, District Judge

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FILED
MAR - 2 1998
COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

UTAH FOAM PRODUCTS, INC., a Utah Corporation,	:	
Plaintiff, Appellant, and Cross-Appellee,	:	
v.	:	
URETHANE COMPANY OF UTAH, a Utah Corporation; EDWARD E. KENDALL; and NEIL B. KENDALL,	:	**Appeal No. 970140-CA**
Defendants, Appellees, and Cross-Appellant,	:	**Priority No. 15**
And	:	
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SUPPLEMENTAL STATEMENT OF FACTS ON CROSS-APPEAL

On January 1, 1991, Arrington Construction Company awarded Urethane the job of applying foam insulation and fire proofing on a project at the Idaho National Energy Laboratory in Scoville, Idaho ("INEL Job"). (R. 390)

John Arrington ("Arrington"), the president of Arrington Construction Company, advised Urethane that Arrington would need a Performance Bond and a Labor and Materials Bond to ensure Urethane's performance of the contract. (R. 390)

Urethane's bonding agents required audited financial statements to issue a bond of the size required for the INEL job. Completing the financial statements would have taken several weeks and Urethane needed bonding immediately. (R. 390)

Because Urethane's work on the INEL job was scheduled to begin before it could obtain the audited financial statement and because of Urethane's financial condition, Ed Kendall decided to ask Utah Foam to provide bonding. (R. 390-391)

On March 14, 1991 Urethane's president, Edward Kendall approached Utah Foam's president Bruce Wilson with an urgent matter relating to Urethane's attempts to obtain a large government construction contract called the INEL project in Idaho. Mr. Kendall told both Mr. Wilson and a bonding agent, Mr. Westover, that Urethane would lose the INEL contract unless Urethane immediately secured bonding. (R. 324, R. 341-42)

In his deposition testimony, Mr. Kendall admitted:

Q: When you went into discuss this bonding matter with Mr. Wilson, you were under some time pressure to obtain a bond at that point; is that correct?

A: Yes it was.

Q: Did you tell him you might lose the job if you didn't obtain the bond?

A: I did. I told them that there was a possibility that we would lose the job if we didn't obtain the bond and we needed -- and at that point we needed the bond virtually immediately. (Emphasis added)

(R. 322)

John Arrington, the general contractor on the INEL project, told Mr. Kendall that: "if Urethane did not provide a bond," Arrington would: "start looking for another contractor." (R. 352-54) As a result of Mr. Kendall's urgent plea, the parties entered into a joint venture and Bonding Assistance Agreement whereby Utah Foam would provide bonding as a joint venture with Urethane on the project. As a joint venturer, Utah Foam was entitled to share in 33% of the gross profits ono the project. (Appellant's Opening Brief, Addendum 2.)

In order to obtain bonding from Southern American, Utah Foam, its individual principals and their wives, and its sister company, Ernest Wilson Company, Inc., were required to execute and submit a General Indemnity Agreement which both personally guaranteed any liability and pledged the assets of Utah Foam, Ernest Wilson Company and their individual principals to indemnify and hold Southern American harmless against "any and all losses and expenses of whatsoever kind or nature . . . which the surety [Southern American] may sustain or incur" as a result of issuing the bonds for Urethane. (R. 363-384)

On March 26, 1991, Southern American issued the required performance, labor and material bonds for Urethane to guarantee its performance of the contract on the INEL Project. (R. 357, R. 361)

At the time the bonds were issued, the parties believed that work on the INEL job would begin in 1991. The job was delayed for over one year solely because of actions taken by the United States Government. (R. 392)

On March 30, 1992, the State of Utah issued notice via Western Union Telegraph that it was placing the bonding company, Southern American in receivership and that all bonds including the INEL bonds were cancelled effective April 25, 1992. (R. 392)

After notification of the cancellation, Utah Foam, its bonding agent, Mr. Westover, and Urethane all took steps to respond to the cancellation by attempting to obtain replacement bonds. (R. 392) Shortly after notice of the bond cancellation and prior to the effective date materials for the Urethane contract were received at the job site (R. 507-08) and Urethane commenced work on the project.

Utah Foam continued its efforts to secure the replacement bonding through American Bonding. The only items needed to secure the replacement bonding was Urethane's cooperation in providing (1) a current bank letter updating a similar bank letter that Westover sent to Southern American to get the first set of bonds; (2) a letter from Urethane's attorney confirming Kendall's statement to Westover that Urethane had settled the dispute involving an old judgment that reflected adversely on Urethane's credit report; (3) return of a simple affidavit form that was to be signed and filled out by Arrington verifying Urethane's status and progress on the INEL

project. American Bonding was prepared to issue the bonds if Urethane supplied these three simple items. (R. 326)

Urethane's President, Kendall, communicated with Wilson and bonding agent, David Westover, frequently about obtaining replacement bonds until shortly after Urethane began construction work on the INEL Project. At that time, Kendall ceased communicating with Westover and Wilson. (R. 325, R. 343-44)

Unbeknownst to Utah Foam and in approximately June of 1992, Ed Kendall approached Arrington and contrary to the facts, stated that Utah Foam was having difficulty obtaining a replacement bond.

> **Q:** Did there come a time when you decided not to require replacement bonds from Urethane Company of Utah?
>
> **A:** Yes.
>
> **Q:** Tell me how that came about and when it was, if you can fix the date, a time?
>
> **A:** Well, shortly after receiving this cancellation of the bond, we received the material. Urethane of Utah moved on-site, brought their equipment to the job site and their personnel and started spraying and appeared that they were capable of doing this contract. Their quality was excellent. The relationship between Arrington and Urethane and the construction manager was excellent. The workmanship was excellent, and during that time period we started to feel more comfortable with them that they could easily finish this contract. And their performance indicated to us that maybe we didn't need a bond.
>
> There was also some question about additional cost for the bond, whether we should incur that cost in view of their actual performance.
>
> So we tentatively made a decision that we probably would not insist on a bond to finish the job. They were actually underway and performing well.
>
> **Q:** Do you know when that decision was made by you?

A: It wasn't overnight. It was probably over a time period.

Q: Did you inform Urethane Company of that?

A: Probably, yes. I think Ed told me he was having some difficulty getting replacement bonds, and so I said "Well, we're willing to accept your performance on this project to continue without a bond."

(R. 508-510, R. 519-520)

Based upon Kendall's statement, Urethane's performance on the job and the additional cost of obtaining bonding, Arrington waived the requirement of replacement bonds and Urethane was then permitted to complete its work on the project without replacement bonds. (R. 383-94)

On July 9, 1992, Urethane sent to Utah Foam Check No. 5823 in the amount of $38,581.25 as payment for Invoice No. 34299 dated 5/5/92. Invoice No. 34299 from Utah Foam to Urethane was for $27,840.45 for materials supplied on the INEL job and $10,740.80 to be applied as payment under the Bonding Assistance Agreement. (R. 539)

That Urethane's Check No. 5823 was returned for insufficient funds and was ultimately replaced with a cashier's check in the amount of $35,000 with the difference of $3,581.25 being charged to Urethane's account. (R. 539)

On July 29, 1992, Urethane sent Check No. 44708 as payment on Invoice No. 34502 in the amount of $18,965.63. Invoice No. 34502 was for $13,390 for materials supplied on the INEL job and $5,575.63 to be applied as payment under the Bonding Assistance Agreement. Utah Foam returned the $5,575.63 at Kendall's request in order to assist

Urethane in making payroll with the understanding that it would be repaid from the proceeds on the INEL job. (R. 539)

Utah Foam sent Urethane a letter on August 10, 1992 reflecting the application of the funds to the different debts. Urethane did not dispute any application of funds under the Bonding Assistance Agreement until February 10, 1993, when Utah Foam received a letter from Ed Kendall. (R. 539-40)

As the result of Utah Foam's assistance to Urethane in obtaining the original bond for the INEL project, and assisting Urethane in finding replacement bonds for over two months, Urethane was able to complete the contract and receive the total contract price of approximately $550,000. Despite having received all that it bargained for and despite the fact that Utah Foam had done everything it promised in assisting Urethane to obtain bonding to get and complete the project, Urethane refused to pay Utah Foam the agreed upon 33% of profits pursuant to the parties agreement. The lower court properly found as a matter of law that Utah Foam was entitled to its agreed upon share of the profits and entered judgment accordingly.

In order to further deny Utah Foam its share of profits, Ed Kendall, prior to the court entering judgment, set about to render Urethane insolvent, filed a Chapter 7 Bankruptcy, and transferred the assets of Urethane to a new business operated in the name of his son. Due to the lower court's erroneous ruling on Ed Kendall's personal guarantee, Ed Kendall has successfully received profits rightfully belonging to Utah Foam, has removed those profits from Urethane and thereby denied Utah Foam monies to which it is entitled.

SUMMARY OF ARGUMENTS

REPLY ARGUMENTS

I. Urethane properly argues that the court should give the term "all obligations" its fair import and meaning. Applying the fair import and meaning to the Kendalls personal guarantee of "all obligations" of Urethane to Utah Foam results in the Kendalls having personally guaranteed Urethane's obligation to Utah Foam under the Bonding Assistance Agreement.

II. Urethane's argument that the Kendalls personal guarantee should be disfavored and limited as a type of dragnet clause has been rejected by the Utah courts. A personal guarantee is not a dragnet clause and will be given force and effect according to its terms.

III. Both Utah Foam and Urethane treated the Bonding Assistance obligation as properly falling under the parties open account. Urethane made several progress payments on invoices billed under the open account. It was not until seven months after the invoices and partial payments that Urethane changed its mind and took a contrary position.

IV. Urethane received the full benefit of its bargain with Utah Foam including the bargained for consideration. Utah Foam provided Urethane with the requested assistance to obtain bonding as bargained for under the agreement. The fact that Urethane negotiated a waiver of the need for replacement bonding after the state cancelled the earlier bonds does not constitute failure of consideration. Urethane received the full benefit of its bargain.

V. It would be unfair and inequitable if Urethane were to keep Utah Foam's agreed upon share of the gross profits. Utah Foam did all it agreed to do and was asked to do by Urethane. Urethane completed the job and received everything it bargained for including the approximate $250,000 in gross profits. Utah Foam is entitled to its agreed upon share of the gross profits in the amount of $65,000.

VI. The Bonding Assistance Agreement created a joint venture between Urethane and Utah Foam. As a joint venturer, Urethane was in a fiduciary relationship with Utah Foam and any advantage Urethane was able to negotiate with Arrington to waive the need for replacement bonds enured to the benefit of the joint venture including Utah Foam.

I.

REPLY ARGUMENT ON PERSONAL GUARANTEES

A. Applying the "Fair Import" of the Terms Used in the Guarantee Agreement Can Only Result in a Finding of the Kendalls' Personal Liability.

Urethane correctly argues in its brief that a court, in interpreting a contract, should enforce the "fair import of its terms." (Appellees Brief at 7) Urethane proceeds, however, to argue in its brief that this court should ignore this enunciated rule of law and render an interpretation of the term "all obligations" as stating something other than its "fair import."

The fallacy in Urethane's argument is best illustrated in Urethane's own brief at page 8. In attempting to argue that the guarantee should not extend beyond obligations arising under the credit agreement, Urethane omitted the word "**all**" in its quote at the

bottom of the page. The omission of the word "all" preceding the word "obligations" evidences Urethane's attempts to rewrite the terms of the guarantee and convince the court that the word "all" is either meaningless or non-existent in the agreement. Indeed, without omitting the word "all" in its quotation, Urethane could not convince even itself of its position.

The strength of Utah Foam's argument that the personal guarantee extended to Urethane's obligation under the Bonding Assistance Agreement is best illustrated by correcting Urethane's quotation at the bottom of page 8 to properly read, "[T]he guarantee applies to '[all] obligations of the purchaser,' and continues 'as long as there are extensions of credit'". Applying the fair import of the above terms can only result in the interpretation that the Kendalls guaranteed "all obligations" of Urethane to Utah Foam.

The cases cited by Urethane in support of their general statements of law do not support Urethane's argument that the Kendalls should escape personal liability in this case. Indeed, in the cases cited by Urethane, Federal Deposit Insurance Corp. V. University Anclote, Inc., 764 F.2d 804 (11th Cir. 1985), Bernardi Brothers, Inc. v. Great Lakes Distributing, Inc., 712 F.2d 1205 (7th Cir. 1983) and Paul Revere Protective Life Insurance Co. V. Weis, 535 F. Supp. 379 (E.D. Pa. 1981), the personal guarantors were found liable despite the language cited by Urethane.

The Newton and Rohn cases cited by Urethane are inapposite as they are distinguished on the grounds that the obligations at issue were not primary obligations of the debtor to which the guarantee ran. In those two cases, the court ruled that the guarantees of the wives

for their husbands' obligations did not extend to their husbands' guarantee of obligations of third parties (i.e., their sons). Those facts are clearly distinguishable from the facts in this case and neither party has argued that the obligation of Urethane was anything other than a primary obligation.

Clearly, applying the fair import of the term "all obligations" such as was done in the two Utah cases of Valley Bank and North Park, cited in Utah Foam's initial brief, renders the Kendalls liable pursuant to their personal guarantee agreement and the court's interpretation otherwise was erroneous.

B. The Kendalls Personal Guarantee Is Not a "Dragnet Clause".

Urethane, in its effort to convince the court to unduly limit the scope of the personal guarantee, urges the court to treat the personal guarantee as a "dragnet clause" in a security agreement. As such, Urethane argues that personal guarantees should not be favored by the courts. (Urethane's brief at 12) Urethane's reliance upon a dragnet clause analysis is misplaced and contrary to the established law of Utah.

A dragnet clause is a provision in a mortgage in which a mortgagor gives security for past and future advances as well as present indebtedness. Black's Law Dictionary, 443 (5th ed. 1979) The case relied upon by Urethane for drawing its dragnet clause analysis is North Park Bank of Commerce v. Nichols, 645 P.2d 620 (Utah 1982). The Utah Supreme Court in that case specifically rejected the personal guarantor's attempts to persuade the court to treat his personal guarantee of "any and all obligations" as a dragnet clause. The court stated:

> Neither the First Security Bank case nor the Heath Tecna case supports Bottum's [guarantor's] position. Neither of those cases dealt with a loan guarantee agreement; each included, rather, the interpretation of standard printed language in a security agreement reciting that the collateral secured all present and future debts.

Id. at 621.

Further, the court went on to clarify that in neither of the two cited cases did the court pronounce future advance clauses as unenforceable. Id. at 622. The court went on to find that the personal guarantor's agreement "clearly specified his obligation to guarantee Nichols present and future obligations to plaintiff." Id. at 622.

Urethane's reliance upon a dragnet clause limitation is misplaced and contrary to the law enunciated in North Park. Clearly, had the Kendalls wished to limit their liability under the guarantee to only the credit agreement as now argued, they could have easily done so by placing words of limitation such as "obligations incurred under the credit agreement." No such limitations were requested and the lower court erred in retrospectively implying such limitations contrary to the express terms of the parties agreement.

C. Urethane's Contention That Utah Foam Never Treated the Obligation Under the Bonding Assistance Agreement as Part of the Open Account is Inaccurate.

Urethane goes to great length in its brief to dispute the assertion that Utah Foam treated the obligation owing under the Bonding Assistance Agreement as part of the open account. Utah Foam did treat the obligation under the Bonding Assistance Agreement as due and owing under the open account.

Utah Foam's president testified that originally he intended to treat progress payments as miscellaneous cash (R. 451), however, Utah Foam had prepared and sent invoices to Urethane which invoices were both for materials purchased and progress payments on the INEL job. R. 513-514, 539) It was not until over seven months later that Urethane disputed the obligation invoiced under the open account. R. 542) It is interesting to note that Urethane during the performance of the INEL contract made two progress payments to Utah Foam on invoices under the open account (albeit one of the checks bounced), without any protest. It was not until seven months later and after Urethane had received the entire profits of approximately $250,000 that it first decided to advise Utah Foam that it was now contesting both Utah Foam's invoices and the obligation itself.

Urethane's reference to the colloquy in the June 9, 1995 hearing regarding the nature of the obligation outstanding as supporting an argument that Utah Foam did not consider the Bonding Assistance obligation as falling under the open account is factually flawed. Prior to the hearing, the court had already entered an order finding Urethane liable under the Bonding Assistance Agreement. The issue being discussed at the hearing was whether an approximate $10,000 payment had been properly applied towards materials purchased or had been applied towards the Bonding Assistance obligation. Counsel for Utah Foam simply clarified that the genesis of the outstanding obligation was the $65,000 due under the Bonding Assistance Agreement and that Utah Foam was not going to get bogged down as to whether the $10,000 payment should have been applied towards materials or the bonding obligation.

Clearly, Utah Foam intended and did treat the progress payments under the Bonding Assistance Agreement as part of the open account. Urethane did not contest that characterization until seven months later when it decided to keep all the profits to itself. To the extent the determination of whether the personal guarantees reach the Bonding Assistance obligation rests upon a finding of intent of the parties as to whether they treated the obligation as falling under the open account, the facts, taken in the light most favorable to Utah Foam, would support a finding of intent to treat the obligation as encompassed under the open account and the lower court erred in granting summary judgment in favor of Urethane on that issue.

II.

RESPONSIVE ARGUMENT ON APPELLEES CROSS-APPEAL

The Lower Court Properly Found Urethane Liable Under the Bonding Assistance Agreement

Despite the fact that Utah Foam performed its obligations under the Bonding Assistance Agreement in every respect, Urethane asserts by cross-appeal that it had no obligation to pay Utah Foam because it was ultimately able to persuade Arrington to waive the requirement for a replacement bond. The following facts are critical:

(1) Urethane approached Utah Foam in the first place requesting its assistance in obtaining a bond;

(2) Urethane needed the bond immediately to avoid having its bid rejected and lose the INEL Project to another contractor;

(3) Urethane proposed Utah Foam receive a one-third share of gross profits if Utah Foam helped Urethane keep the INEL Project by helping Urethane secure a bond;

(4) Utah Foam and Earnest Wilson Company, Inc, their principals and their wives all furnished extensive financial and credit information and provided security for Urethane's

Performance Bond by pledging assets; bonds then were issued in the face amount of $491,588 for the Performance Bond and in the face amount of $491,588 for the Labor and Material Bond;

(5) Utah Foam, Ernest Wilson Company, Utah Foam's principals and their wives all signed General Indemnity Agreements pledging their respective corporate and individual assets to enable Urethane to obtain the bonding and ensure that Urethane get the construction contract;

(6) Plaintiff, its principals and their wives pledged themselves to liability and exposure of up to $983,000 under the terms of the General Indemnity Agreement;

(7) Utah Foam's assets, and that of its principals, were pledged, committed and unavailable for other business purposes for approximately one (1) year before Southern American's bond was cancelled by the State of Utah.

Urethane got exactly what it bargained for under the terms of the Agreement. Having received and used the benefits of the Agreement, Urethane's argument that it should be allowed to escape its obligation to pay the one-third share of gross profits promised under the Agreement was properly rejected by the court. The mere fact that Urethane was somehow able to obtain Arrington's waiver of replacement bonds, does not operate as a release of its obligation to pay for Utah Foam's assistance in getting the bonds for the contract to perform the work on the INEL project.

A. Urethane received the full value and bargained for consideration under the Bonding Assistance Agreement.

Urethane attempts to mislead the Court into believing that the central, underlying purpose of the Bonding Assistance Agreement was to provide bonding throughout the course of the INEL construction period. However, the written terms of the contract, and the testimony of Arrington, Wilson and Kendall unequivocally demonstrate that the central purpose of the Bonding Assistance Agreement was not to provide bonding for the duration of the construction, but to assist Urethane

in obtaining a Payment and Performance Bond to keep Arrington from hiring another subcontractor to construct the INEL Project.

The Bonding Assistance Agreement itself provides, in pertinent part, that: "As of March 13, 1991, Urethane Co. Of Utah is unable to bond this project and has asked Utah Foam Products, Inc. for assistance." (R. 456) The stated purpose of the contract is to provide bonding assistance because Urethane was unable to bond the project as of March 13, 1991. The uncontraverted testimony reflects that:

1. Arrington was going to look for another subcontractor unless Urethane immediately bonded the job. (R. 355-56)

2. Urethane was unable to bond the job and immediately needed Utah Foam's assistance. (R. 456, R. 322)

3. Kendall told Westover that Urethane would lose the job unless they got Utah Foam's assistance. (R. 307-08)

4. Utah Foam performed its obligations under the contract and did, in fact, assist Urethane in obtaining a bond.

After rendering bonding assistance to Urethane in March 1991, Utah Foam had no further obligations under the Bonding Assistance Agreement unless requested. The mere fact that Urethane did not later need bonding assistance after Urethane obtained the waiver in the summer of 1992, does not affect Urethane's obligation to pay under the Agreement for Utah Foam's bonding assistance in March 1991.

In Copper State Leasing Co. v. Blacker Appliance & Furniture Co., 770 P.2d 88 (Utah 1988), the Court held that if the language of a contract is unambiguous, the court can, as a matter of law, interpret the contract, including the contract's definition of the consideration supporting the contract. Consideration is an "act or promise, bargained for and given in exchange for a promise . . . For the

mutual promises of the parties to a bilateral contract to constitute the consideration for each other, the promises must be binding on both parties . . . Failure of consideration [as opposed to lack of consideration] exists 'wherever one is either given or promised to give some performance fails without his fault to receive in some material respect the agreed exchange for that performance.'" Id. At 91.

The parties' testimony and the contract language inescapably leads to the conclusion that the central purpose of the Bonding Assistance Agreement was to assist Urethane in obtaining a bond to keep from losing the INEL project. Once Urethane obtained a bond and was allowed to begin construction of the project, the material terms of the contract were performed and payment under the contract should be enforced as a matter of law. Although defendants go into great detail about the fact that they did not ultimately need a replacement bond, Urethane had already received the full value of Utah Foam's bonding assistance; that is, they got a bond and started work on the INEL project.

There is no genuine dispute of fact that Arrington did not waive the requirement of a replacement bond until Kendall told him that he was having difficulty replacing the bond and after Urethane had started construction on the INEL project in the first place. Simply stated, the issue of a replacement bond and waiver of the bond is immaterial and a red herring.[1]

---

[1] Contrary to defendant's argument, there is absolutely nothing in the contract language or testimony that suggests that the "very object of the Agreement was defeated" when the bonds were cancelled and not replaced.

Failure of consideration is an affirmative defense that must be established by the defendant. Bentley v. Potter, 647 P.2d 617 (Utah 1984). In the instant case, Urethane received everything it bargained for. The fact that the consideration may, in hindsight, be viewed by Urethane as worthless or of little value because of an unexpected occurrence is not a failure of consideration. Konecko v. Konecko, 330 P.2d 393 (Cal. App. 1958).[2]

Moreover, the defense of failure of consideration cannot be allowed where, as here, Urethane implicitly, if not expressly orchestrated Arrington's waiver of the requested replacement bond requirement. It is well established that a person cannot avoid liability for the performance of its obligation by placing such obligation beyond his control by his own voluntary act. Cannon v. Stevens School of Business, Inc., 560 P.2d 1383 (Utah 1977). It is abundantly clear that the replacement bond requirement was waived by Arrington for a number of reasons including the fact that Kendall told Arrington he was having "difficulty" in obtaining a replacement bond as well as the additional cost to Arrington, and the fact that Urethane was already on the job and performing in a satisfactory manner. Under the circumstances, the lower court properly found that Urethane would not be allowed to evade payment under the contract when it actively participated in obtaining a waiver of a replacement bond.

---

[2] An occurrence or contingency which occurs after the time of entering the contract must result in a material failure of performance by one party. Copper State Leasing Co. v. Blacker Appliance & Furniture Co., supra. See Benson v. Andrews, 292 P.2d 39 (Cal. App. 1955). The fact that Arrington waived the requirement of a replacement bond a year after the contract does not constitute a material failure of performance of the Bonding Assistance Agreement.

B. The lower court agreed that it would be unfair and unequitable to allow Urethane to obtain value under the contract without paying Utah Foam the agreed upon consideration.

Urethane received everything it bargained for under the Bonding Assistance Agreement. Incredibly, Urethane asserts that it would be unfair and inequitable for Utah Foam to receive one-third or $65,000 of the profits in this case when: (1) Ed Kendall is a sophisticated businessman who has obtained numerous construction bonds over the years; (2) Urethane approached Utah Foam desperately seeking its immediate help; and (3) Mr. Kendall himself proposed Utah Foam receive one-third of gross profits. This Court should affirm the lower court's rejection of Kendall's cynical ploy to escape a payment obligation he himself proposed and negotiated at arm's length with Utah Foam.

Indeed, it would be unfair and inequitable for any Court to re-write the contract between the parties and thereby rob Utah Foam of the benefit of its bargain. Utah Foam's bonding assistance made it possible for Urethane to keep this $500,000 job. "[I]t is not up to the Court to rewrite a contract improvidently entered into at arm's length or to change the bargain indirectly on the basis of supposed equitable principles." Dalton v. Jerico Construction Co., 642 P.2d 748, 758 (Utah 1982); accord Hal Taylor Assocs. v. Unionamerica, Inc., 657 P.2d 743, 749 (Utah 1982).

C. Urethane admitted Utah Foam was a joint venture partner and the lower Court properly found that any waiver of a contract requirement by Arrington would enure to the benefit of both the joint venturers.

In the briefing below, Urethane admitted that the Bonding Assistance Agreement was intended and did create a joint venture

between Urethane and Utah Foam on the INEL project. (R. 405) The Utah Supreme Court has defined the relationship of joint venturers as follows:

> [4] The relationship between joint adventurers is fiduciary in character, and imposes upon all the participants an obligation of loyalty and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to the matters pertaining to the enterprise.

Lynch v. MacDonald, 367 P.2d 464, 468 (Utah 1962).

It necessarily follows in accordance with Urethane's fiduciary relationship with Utah Foam, that any waiver of a replacement bond negotiated by Urethane enured to the benefit of the joint venture and did not in any way affect the agreed upon sharing of profits as set forth in the Bonding Assistance Agreement.

The lower court was correct in finding that the waiver of the replacement bond did not effect Urethane's obligation to pay Utah Foam one-third of the gross profits from the project.

CONCLUSION

A plain reading of the personal guarantee executed by the Kendalls shows that they guaranteed "all obligations" of Urethane to Utah Foam. There is no language in the agreement limiting the guarantee to only obligations arising under the credit agreement. Applying the fair import of the terms used, all obligations, can only result in a finding that the Kendalls guaranteed Urethane's obligation to Utah Foam under the Bonding Assistance Agreement and the lower court erred in granting the Kendalls' motion for summary judgment on their personal guarantees.

Utah Foam fully performed all its obligations under the Bonding Assistance Agreement and Urethane received all that it bargained for including the total gross profits of approximately $250,000. Utah Foam stood ready, willing and able to assist Urethane in obtaining replacement bonds if necessary and Urethane's negotiation of a waiver of replacement bonds enured to the benefit of both parties as joint venturers. Clearly there was no failure of consideration and the lower court's granting of summary judgment on Urethane's obligation should be affirmed.

DATED this 2nd day of March, 1998.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 2nd day of March, 1998, I hereby caused to be mailed, postage prepaid, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANTS** to the following:

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